

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

FILED

JUL 25 2007

U.S. DISTRICT COURT
WHEELING, WV 26003

JUSTIN PISTORE,

Plaintiff,

v.

**Civil Action No. 3:05-CV-123
(Bailey)**

**CHRISTOPHER M. ROPER,
Individually and in his Official Capacity, and,
CHARLES C. COLE, SR.,
Individually and in his Official Capacity,**

Defendants.

**ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL
DEFENDANT ROPER'S PSYCHOLOGICAL RECORDS**

On this day, the above-styled matter came before the Court for consideration of the Plaintiff's Objections to Magistrate Judge Seibert's January 8, 2007, ruling, which denied the plaintiff's motion to compel [Doc. 55]. Specifically, the plaintiff seeks an order of this Court to compel production of defendant Roper's psychological and polygraph exams, which were subpoenaed in the subpoena issued on October 13, 2006.

In his Objections [Doc. 57], the plaintiff argues that the Court erred in denying him access to the psychological and polygraph exams. In its ruling [Doc. 55], the Magistrate Court found that the defendants did not appropriately raise the official information privilege, yet denied the plaintiff relief because he requested the documents by subpoena instead of filing a motion to compel. The plaintiff suggests that the Court based its denial on a punitive determination that the plaintiff had procedurally erred.

Prior to the subpoena, the plaintiff had properly requested the documents in

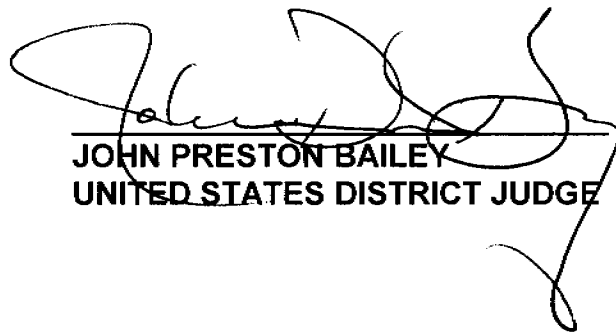
the normal course of discovery, and the defendant responded that it did not have certain medical documents in its care, custody or control [Doc. 30]. Accordingly, this Court finds that filing a motion to compel documents to which the defendant claims it does not possess would be fruitless. Therefore, issuing a third-party subpoena is the proper way to proceed.

Based on the foregoing consideration of the plaintiff's Objections and memorandum in support thereof [Doc. 57], this Court finds that the plaintiff's motion to compel [Doc. 31] should be, and is, hereby **GRANTED**. To the extent that this Order grants the motion to compel, the Court **declines to adopt** Magistrate Judge Seibert's January 8, 2007, ruling [Doc. 55].

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record.

DATED: July 25, 2007.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE